IN THE

Supreme Court of the United States

October Term 1964.

No. 296.

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER, THE GOODYEAR TIRE & RUBBER COMPANY.

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January 28, 1965.

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Opinions Below.

The Court below affirmed an order to cease and desist entered by the Federal Trade Commission (hereinafter the "Commission") because of an alleged violation of Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U. S. C. §45(a)(1) (1958).

The Initial Decision of the Hearing Examiner (R. 94),* which recommends dismissal of the complaint against The Goodyear Tire & Rubber Company (hereinafter "Goodyear"), is reported at 58 F. T. C. 309 (1961). The Commis-

* "R." refers to the record herein which consists of the printed Joint Appendix (in five volumes) filed in the Court of Appeals and the opinion, judgment and final decree of the Court of Appeals.

sion's order (R. 114) and its opinion reversing the Examiner (R. 118) are reported at 58 F. T. C. 309 beginning at page 323.

The opinion of the Court of Appeals (R. 3680) affirming the Commission is reported at 331 F. 2d 394.

Jurisdiction.

The judgment (R. 3697) and the final decree (R. 3698) of the Court of Appeals were entered on April 24, 1964 and May 20, 1964, respectively. The petition for a writ of certiorari was filed July 20, 1964 and was granted December 14, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1) (1958).

Questions Presented.

Goodyear has sales commission agreements with The Atlantic Refining Company ("Atlantic"), its co-respondent in the instant proceedings before the Commission, and with some twelve other non-respondent petroleum companies.* Under those agreements Goodyear pays commissions to the oil company in return for the latter's assistance in promoting the sale through its dealers of Goodyear tires, batteries, and accessories ("TBA" or "TBA products").

No conspiracy between Atlantic and Goodyear was alleged or found, and it is undisputed that Atlantic entered into its sales commission agreement with Goodyear only after Atlantic had encountered serious distribution and cost problems in using the only feasible alternative method of

* The present tense is often used throughout in relating facts of record although such facts describe events no more recent than the filing of the complaint in 1956. Certain changes have taken place since then, as, for example, in the number of companies with which Goodyear has sales commission agreements.

TBA distribution. Nevertheless, the Commission found that Atlantic's "power" with respect to its dealers made its sales commission agreement with Goodyear an "unfair method of competition" within the meaning of the Federal Trade Commission Act, §5(a)(1).

As to the non-respondent oil companies with which Goodyear has sales commission agreements, there is no significant evidence of record concerning their dealer relationships or the presence or absence of oil company "power" to influence TBA sales. Nevertheless, the Commission entered an order barring Goodyear perpetually from any further participation in any sales commission agreement, not only with Atlantic but with any marketing oil company.

The Court below approved the Commission's action.

In the Commission's petition for a writ of certiorari to review a conflicting decision by the Court of Appeals for the District of Columbia Circuit in a pending companion proceeding, *Federal Trade Commission* v. *Texaco, Inc. and B. F. Goodrich Co.*, No. 635, October Term, 1964 (hereinafter "Petition, *Goodrich-Texaco*"), the Solicitor General has posed the controlling issue before the Court in the following language:

> (1) "Whether it is an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, for a major rubber company and a major oil company to enter into an agreement under which the oil company, in return for a commission, sponsors the sale of the rubber company's products to the oil company's retail dealers." (p. 2).

The question as stated* in No. 635 articulates—for the first time—just what the Commission has done, what the

* The reference to "major" oil and rubber companies is unwarranted, since the Commission's order bars Goodyear from a sales commission arrangement with *any* marketing oil company and bars Atlantic from such an arrangement with *any* rubber company.

Court below has approved and what the Court of Appeals for the District of Columbia Circuit has disapproved. Comprehended within this basic question are certain subsidiary questions which were set forth in our petition for certiorari:

(2) Is a sales commission agreement between Goodyear and Atlantic totally unlawful merely because Atlantic has the ability, without the exercise of coercion or use of tying agreements, to influence the purchase of a substantial volume of TBA products?

(3) Is any sales commission agreement totally unlawful merely where a sponsoring party (in this case any petroleum company) may be able, without the exercise of coercion, or use of tying agreements, to influence the purchase of a substantial volume of the sponsored product (here TBA)?

(4) May the Commission dispense with any attempt at market analysis and establish a conclusive presumption that any oil company which has leases with, or lends equipment to, its franchised dealers has the ability, deemed unlawful, to influence the requisite "substantial" volume of sales of the sponsored product?

(5) May the Commission altogether outlaw a time-tested method of distribution which offers undisputed benefits to the public and to all parties concerned without considering the possibility of more limited alternative remedies?

Statute Involved.

The statute involved in this case is Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U. S. C. §45(a) (1958), which in pertinent part provides that:

"(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * * * *

"(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Statement.

A. Context of the Litigation.

The instant case is one of three parallel cases, all currently in the courts, brought by the Federal Trade Commission in 1956 to abolish one of the two traditional methods of distributing automobile tires, batteries and accessories through service stations. This method is called "sales commission" distribution.

Goodyear* and Atlantic were joined as respondents in an amended complaint, issued May 22, 1956 (R. 5), which charged that they had entered into agreements which "have the capacity and tendency to restrain unreasonably and have restrained unreasonably" the commerce in TBA products (R. 12). Goodyear is a large manufacturer of rubber products (R. 157). Atlantic is a medium-size producer, refiner and distributor of petroleum products; it markets gasoline and related petroleum products under the "Atlantic" brand through retail outlets and wholesale distributors in 17 eastern states and the District of Columbia (R. 28).

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* The Goodyear Tire & Rubber Company, Inc., also named as a respondent, was a wholly-owned marketing subsidiary of Goodyear which was merged with Goodyear in 1956 (R. 1, 5-6). This fact is not significant to this litigation and both Goodyear respondents are collectively referred to as "Goodyear".

The complaint challenged a contract entered into in 1951 between Atlantic and Goodyear, whereby Goodyear agreed to pay Atlantic a commission on Goodyear's TBA sales to dealers in Atlantic's products in exchange for Atlantic's services in promoting Goodyear's TBA.

In addition, the complaint attacked similar sales commission agreements between Goodyear and some twelve other marketing oil companies;* of these companies, most are a good deal smaller than Atlantic, and only two are, or are affiliated with, national concerns. The complaint also alleged that Atlantic had entered into a similar TBA sales commission agreement with The Firestone Tire & Rubber Company ("Firestone").

It was alleged that all the contracts—those between Goodyear and all other oil companies and that between Atlantic and Firestone as well as the one between the parties here—were illegal (R. 12). However, only Atlantic and Goodyear were named as respondents to this proceeding.

Concurrently with the institution of the instant complaint, the Commission initiated two similar proceedings, one against Shell Oil Company ("Shell") and Firestone, and the other against The Texas Company ("Texaco") and The B. F. Goodrich Company ("Goodrich"). Like the instant one, these complaints attacked sales commission agreements between the respective parties and between each party with all other rubber or oil companies.

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* The petroleum companies which the record shows as having sales commission arrangements with Goodyear were: Anderson-Prichard Oil Corporation, Ashland Oil & Refining Co. Inc. (and certain subsidiaries of Ashland), Atlantic Refining Company, Carter Oil Company, D-X Sunray Oil Company, Frontier Refining Company, Quaker State Oil Refining Corporation, Richfield Oil Company, Shamrock Oil and Gas Corporation, Shell-American Petroleum Company, Shell Oil Company, Sinclair Refining Company and Sherwood Brothers Inc. (R. 119, 2493, 242, 2573-76, 243).

All three complaints were tried as separate proceedings before the same Hearing Examiner (Earl J. Kolb, later appointed Chief Examiner) who held hearings over a two-year period from October 1956 to February 1959. In October, 1959 the Hearing Examiner rendered initial decisions finding in all three cases that the oil companies had exercised specific acts of coercion against their dealers, but that this was not caused by the rubber companies or the sales commission agreements. Accordingly, he entered injunctions against the oil companies' exercise of coercion, but dismissed the complaints against the rubber companies.

The Commission reversed all three decisions. Upon the original record in each case,* it found that the sales commission agreements violated Section 5 of the Federal Trade Commission Act. In each case the Commission issued an order barring the rubber company from entering into any sales commission plan with any oil company at all, thereby prohibiting not only existing agreements but any that might be contemplated in the future with any marketing oil company of whatever size. It also barred the three oil companies from participating in any sales commission plan for tires, batteries, or accessories with any company whatever.

All the cases were appealed. Goodyear and Atlantic filed petitions to review and set aside the Commission's order with the Court of Appeals for the Seventh Circuit. The petitions to review were denied by that Court and

* In the *Goodrich-Texaco* case, the Commission initally remanded the case to the Hearing Examiner for further hearings as to the competitive effects of the sales commission agreement. After such hearings, the proceeding returned to the Commission which then entered an order explicitly based on the original record. See *The B. F. Goodrich Co.*, 58 F. T. C. 1176 (1961), and CCH TRADE REG. REP. 1961-63 Transfer Binder ¶16,378 (1963) (not bound).

the Commission's order in all respects affirmed (R. 3680). That decision is now under review in this case and in No. 292, *The Atlantic Refining Company* v. *Federal Trade Commission, cert. granted,* December 14, 1964.

Goodrich and Texaco appealed to the Court of Appeals for the District of Columbia Circuit. That Court on July 30, 1964 set aside the order and remanded the case to the Commission with instructions to dismiss the complaint.*

Firestone and Shell petitioned to the Court of Appeals for the Fifth Circuit. Argument was heard on January 16, 1964, and decision is still pending.

B. The Commercial Context.

The sales commission method of distribution has been widely used, for more than two decades, to facilitate the marketing of TBA through automobile service stations. Motorists prefer "one-stop" service stations capable of supplying, not only gasoline and oil, but also the full range of products required for the operation of the modern automobile (R. 1505, 1846, 2267-68). As a result, the nation's neighborhood "gas stations" have become, in response to motorists' demands, one of the major sources of supply for replacement TBA products (R. 122).

To meet this consumer demand under contemporary conditions is a complex task. The service station must have access to a wide variety of tires—for example, Goodyear manufactures and markets approximately 130 different popular-sized tire models (R. 2221). In addition, the service station must carry various sizes and types of batteries and a host of accessories such as spark plugs,

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* As already noted, a petition for a writ of certiorari to review the *Goodrich-Texaco* decision has been filed in this Court on the Commission's behalf (No. 635, October Term, 1964) and is *sub judice*.

radiator chemicals, lamps and bulbs, windshield wipers and blades, polishes, waxes, etc. (R. 99-100, 517-19).

The efficient provision at point of sale of such a range of products requires knowledge, skill and organization. The service station operator must be trained in several areas: the products available, installation and repair of such products, sound inventory practices and modern sales techniques (R. 1507, 2221-24, 2268). Behind the station operation must stand a well-developed warehousing and distribution system.

The Hearing Examiner made clear—and the Commission did not deny—that an oil company TBA program benefits motorists and dealers, as well as oil companies and rubber companies:

> "Tires, batteries and accessories have become a necessary and integral part of the business operation of the Atlantic dealer. He cannot profitably and successfully operate his business without the added revenue from that portion of his business which also enables the dealer to give complete service to his customers. The service station is important to TBA manufacturers as an outlet for distributing to customers. It is to the interest of The Atlantic Refining Company to have its dealers engaged in the sale of TBA as this builds a stronger dealer organization and increases the sale of gasoline". (R. 99-100).

The Court below agreed:

> "TBA is an integral part of service station operations. Dealers must carry it in order to give complete service to motorists and to operate their stations at a profit. There are a large number of TBA items available to dealers, and there are constant changes and production developments in TBA of which the dealers must be trained and kept informed. Every major oil company offers some

kind of TBA program to give training and advice to its service station dealers". (R. 3685).

Over the years, two methods have developed in the petroleum industry for meeting these marketing needs. One of these is the so-called "purchase-resale" method, which the Commission's opinion approves (R. 183-85). Under this method, the petroleum company purchases TBA products and resells them, along with gasoline and oil, to its service station dealers.

"Purchase-resale" has a particular vogue today among the larger petroleum companies, such as Standard of New Jersey, Standard of California, Standard of Indiana, Socony-Mobil, and Phillips Petroleum. (*The Firestone Tire & Rubber Company,* 58 F. T. C. 371, 388 (1961)). They have the resources to provide, and a sufficient number of service station outlets to warrant, the necessary investment in warehousing and distribution facilities for TBA. Atlantic made use of the purchase-resale method in earlier days, but gave it up in 1951 when it found that its sales of TBA were insufficient to warrant the costs of training, warehousing and overhead (R. 100-101, 2357-62, 2859-64, 239).

The second principal method of TBA distribution through service stations is the "sales commission" method involved in this case. It evolved a generation ago as an alternative to purchase-resale. Goodyear, which manufactures tires, tubes and certain accessories in its own factories and distributes batteries and accessories acquired from outside sources, entered such a sales commission plan with Atlantic in 1951.

In return for Atlantic's sales assistance Goodyear agreed to pay to Atlantic a 10% commission on sales of Goodyear TBA to Atlantic retailers in seven northeastern

states and the Philadelphia area of Pennsylvania and to pay a $7\frac{1}{2}\%$ commission on TBA sales to Atlantic wholesale distributors in the same area. The Commission's opinion does not challenge either the rates of these commissions or the fact that Atlantic made expenditures approximately equal to them. Moreover, there is no claim that Atlantic wholesalers and retailers who bought Goodyear TBA under this plan did so on different terms from other wholesale and retail customers of Goodyear or that they were required to absorb the commissions paid by Goodyear to Atlantic.

The services which Atlantic supplied to Goodyear in return for its commissions are described in the Hearing Examiner's Initial Decision and are not disputed by the Commission. Atlantic operated training schools for dealers and prospective dealers which included promotional and merchandising aspects of TBA sales; conducted tire clinics jointly with Goodyear personnel to familiarize Atlantic dealers in the care and repair of Goodyear tires; advised prospective new dealers of the importance of TBA and recommended Goodyear TBA products; assisted dealers in arranging for Goodyear TBA inventory; conducted dealer meetings which discussed TBA sales; arranged for advertising and promotion of Goodyear TBA products; suggested methods of TBA merchandising in its dealer magazines; and made Goodyear TBA products available to credit card holders (R. 101-102).

The sales commission plan is not an independent source of revenue to Atlantic, but rather aids Atlantic in its primary business of selling gasoline and other petroleum products. Atlantic's commission receipts under its two agreements with Goodyear and Firestone have averaged about $\frac{1}{4}$ of 1% of its petroleum revenues, and the costs to Atlantic of its participation in the TBA program are approximately equal to its receipts from it (R. 2364).

C. Operation of Goodyear's Sales Commission Plan with Atlantic.

The evidence in this case concerning sales commission plans is devoted almost entirely to the particular sales commission agreement between Goodyear and Atlantic.

Goodyear makes tires and tubes for automotive vehicles in factories in five states. It sells these at wholesale and retail through some 12,000 independent franchised dealers, and 500 company-owned stores (R. 157-58).

Many of these dealers serve as supply points to oil company dealers under Goodyear's sales commission arrangements. For the Atlantic outlets, there were at the time of the hearing 162 supply points, of whom 128 were independent businesses (including Atlantic service stations) operating under franchise and selling to everyone they pleased, the other 34 being company-owned Goodyear stores (R. 525, 3407, 1449). To operate satisfactorily, supply points must carry a balanced and full stock of TBA products and maintain adequate equipment, business and staff facilities; they often employ delivery trucks and salesmen (R. 524-25).

There is no evidence and no finding that any competent Goodyear dealer not designated as a supply point wanted to become one, or that any such dealer was denied the opportunity to become one.

The record, which describes the situation obtaining in 1955-56, shows that Atlantic distributes its gasoline and other automotive petroleum products to some 5,500 retail dealers, of whom some 2,400 are in the area covered by the Atlantic-Goodyear sales commission agreement (R. 140, 132). In that area, in addition, Atlantic sells its petroleum products to some 47 wholesale distributors who service about 390 retail outlets (R. 146, 132). Most of these gasoline retailers operate service stations which are likely to offer TBA (as contrasted to the country store or roadside res-

taurant which may have a gas pump, without more, in the yard).

Atlantic sells directly to two types of retailers: contract dealers who own their own stations or lease them from others, and "lessee-dealers" who lease their stations from Atlantic. The contract dealers are often lent station equipment by Atlantic and their contracts usually require them to purchase a minimum amount of gasoline in the course of a year (R. 144). The lessee dealers generally hold one-year leases, although in some instances the lease term may be longer or shorter (R. 99, 140).

At the time Atlantic entered into the sales commission agreements in 1951 and at times thereafter, it advised its dealers that the plan did not obligate them to buy Goodyear TBA (R. 103-104, 2892-93, 220). Atlantic stressed that "under no circumstances are our dealers to be made to feel that they must buy this new program" (R. 2891, 220).*

During the hearings the Commission introduced the testimony of 16 former Atlantic dealers—8 from areas not covered by Goodyear, and the remaining from the Philadelphia area. Some of these testified that despite Atlantic's instructions, they had been pressured by Atlantic's salesmen to buy sponsored brands of TBA (R. 104-08).

In rebuttal, Atlantic introduced the testimony of 38 dealers and ex-dealers who testified that they had regularly sold other brands of TBA without objection (R. 108-09). The Examiner found on all the testimony that no dealers carried the sponsored brands of TBA exclusively; all dealers carried some non-sponsored TBA in varying amounts "to satisfy demands of their customers" (R. 109).

In addition, it was shown that there is aggressive competition between the petroleum companies for the services

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* It instructed dealers to report directly to Atlantic any instance in which "any of our people at any time insist on your buying any certain products or merchandise against what you feel is to your best interest" (R. 3038, 406).

of qualified dealers, who are often local businessmen with an entrenched customer following (R. 1493-97, 2353). It would thus be in the interest of Atlantic not to jeopardize its dealer relationships in the petroleum business by demands with respect to TBA—on which Atlantic makes no profit.*

The Examiner concluded that the contracts between Atlantic and its dealers did not require the purchase of Goodyear TBA, and that "No inference or implication can be drawn from the contractual relationship between Atlantic and its dealers, that the degree of control by Atlantic over its dealers is sufficient to force its dealers to purchase only sponsored TBA" (R. 111). However, he concluded that certain of Atlantic's representatives had pressured some dealers into buying sponsored lines of TBA and to discontinue the purchase or display of other brands (R. 110). Accordingly, he entered a detailed order designed to prohibit coercion by Atlantic of its dealers (R. 112-13).**

At the same time, he found that Goodyear was not responsible for any coercion of Atlantic's dealers or guilty of any other coercive practices. He found that:

> "There is no evidence that The Goodyear Tire & Rubber Company, or The Goodyear Tire & Rubber Company, Inc., engaged in, or participated in, any of acts or practices designed to force dealers and distributors of The Atlantic Refining Company to purchase Goodyear TBA products". (R. 110).

This conclusion was based upon a record concerned almost exclusively with the nature and operation of Goodyear's sales commission agreement with Atlantic. The

* The mere replacement of a lost dealer is a matter of considerable expense (R. 1496-97).

** The findings of coercion by the Hearing Examiner, as approved by the Commission, are not now contested by Atlantic before this Court.

Initial Decision of the Hearing Examiner does not even mention Goodyear's sales commission agreements with other oil companies and made no finding as to their nature or operation. While the Commission made a bare passing reference to these agreements, its opinion contains no findings addressed to actual operations under any of them.* There is no finding by the Commission that each of these companies pressured its dealers to buy sponsored TBA. The Court below, except for reciting the complaint, makes no reference whatever to these other contracts and other oil companies. Indeed, its opinion states that "the heart of this case is the economic power *Atlantic* possesses over its service station dealers" (Emphasis added) (R. 3690).

D. Rulings Below.

The Hearing Examiner found that Goodyear had been guilty of no unfair practice. He found:

> —there was neither charge of nor proof of a conspiracy between Goodyear and Atlantic or anyone else to restrict competition in the sale of TBA (R. 110);
>
> —"The consideration for the payment of commission to Atlantic under the sales commission contract is based upon substantial services rendered by Atlantic in promoting the sale of Goodyear TBA to Atlantic dealers and distributors" (R. 111);
>
> and that
>
> —the terms of the contracts and leases between Atlantic and its dealers were not unreasonable and did not themselves confer upon Atlantic control sufficient to require its dealers to carry only sponsored TBA (R. 111).

* The Commission remarked that the other contracts "are in all material respects identical with the Goodyear-Atlantic contract," and drew a bland inference from the isolated testimony of dealers from two other oil companies—Sinclair-Sherwood and Shell—that they had been subjected to pressure (R. 162).

Accordingly, he dismissed the complaint against Goodyear and prohibited Atlantic from coercion of its dealers (R. 112-13).

The Commission brushed coercion aside. In reversing, it relied upon a view that Atlantic and, inferentially, other oil companies had a "power" over their dealers which rendered a sales commission plan improper whether or not acts of coercion were proved (R. 119, 179-86).

The Commission cited *Northern Pac. Ry. v. United States,* 356 U. S. 1 (R. 179), but evidenced its unwillingness to rely thereon:

> "But we do not rest our decision on a mechanical application of the rule of the *Northern Pacific* and *Osborn* cases. The issue here is the legality of respondents' use of a *particular method* of distributing TBA products. Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic. Determination of illegality in this context requires an evaluation of competitive effects resulting from the sales commission method of distributing TBA used by these respondents" (R. 181).

After purportedly evaluating these "competitive effects" the Commission concluded that the sales commission plan foreclosed TBA sales by others to Atlantic dealers (R. 181-83), and that the use by Goodyear of "supply points" to handle sales to its service station customers restricted competition among Goodyear's retail and wholesale dealers (R. 182).

Upon this basis the Commission entered an order sweepingly condemning any use of the sales commission plan. It forbade Goodyear, *inter alia,* from:

> "1. Entering into or continuing in operation or effect any contract, agreement or combination, express or implied, with . . . any . . . marketing oil company whereby Goodyear, directly or indirectly, pays or contributes anything of value to any such marketing oil company in connection with the sale of TBA products by Goodyear or any distributor of Goodyear products to any wholesaler or retailer of petroleum products of such marketing oil company;
>
> "2. Paying, granting or allowing, or offering to pay, grant or allow, anything of value to . . . any . . . marketing oil company for acting as sales agent or for otherwise sponsoring, recommending, urging, inducing or promoting the sale of TBA products, directly or indirectly, by Goodyear or any distributor of Goodyear products to any wholesaler or retailer of petroleum products of such marketing oil company" (R. 116-17).

On appeal, the Seventh Circuit affirmed the order in all respects, its opinion finding that there was substantial evidence to warrant the Commission's conclusions (R. 3683). The Court also invoked a "tying" theory to support the Commission's order, despite the Commission's statement that it did not rely thereon (R. 3690, 3693-95).

In answer to Goodyear's contention that there was no basis for outright abolition of sales commission plans with all oil companies, the Court said simply that "we think the Supreme Court answered petitioners' contentions in *F. T. C.* v. *Ruberoid Co.,* 343 U. S. 470, 473," which states that the Commission's remedial power is not limited to the prohibition of illegality "in the precise form in which it is found to have existed in the past" (R. 3696).

Summary of Argument.

I.

The Commission's order, approved by the Court below, violates controlling law in its attempt to abolish totally Goodyear's sales commission plan with Atlantic.

It is uncontradicted that a TBA program results in benefits to American motorists, service station dealers, oil companies and rubber companies. Yet, the Commission has completely prohibited Atlantic and Goodyear from a sales commission plan notwithstanding the fact that Atlantic attempted the only alternative method of TBA distribution (a purchase-resale plan) and found it economically unfeasible.

In ignoring the benefits derived by everyone concerned from a TBA program, the Commission also ignored the strictures of this Court that the advantages and the economic setting of a particular business method must be carefully considered before that method can be condemned under the antitrust laws. These precedents of the Court apply with equal force to a proceeding under Section 5 of the Federal Trade Commission Act when a long-standing and widespread method of product distribution is sought to be condemned as a *per se* unfair method of competition.

Instead, the Commission relies on a theoretical construct—a postulate that Atlantic has "power" over its dealers (derived solely from its contracts and leases with them) which renders any sales commission plan whatever totally illegal. The Commission did not explore the exercise of that claimed "power" and did not rely upon a finding that Atlantic had pressured its dealers; its result, rather, is based on the conclusive presumption, without supporting findings, that an oil company's "power" will always result

in a "foreclosure" of TBA sales to its dealers under a sales commission plan.

This presumption of the Commission is directly contradicted by the *Goodrich-Texaco* decision of the Court of Appeals for the District of Columbia Circuit, which ruled that there was no showing that Texaco had such "power" over its dealers, notwithstanding contracts and leases similar to Atlantic's.

Moreover, in adverting to the "effects" of the presumed "foreclosure" the Commission failed to define the line or lines of commerce, the area of effective competition and the substantiality of the competition alleged to have been foreclosed. In so doing, the Commission wholly disregarded the careful economic analysis which the decisions of this Court require.

In any case, there is no tenable basis for the Commission's decision. Given the Commission's notion of oil company "power" and its presumed effects, there is no justification for banning sales commission plans while permitting purchase-resale distribution, which is most easily employed by the larger oil companies. Furthermore, the idea that "power" is a justifiable basis for abolition of a sales commission plan is contradicted by the specific provisions of the Automobile Dealers' Day In Court Act and by the fact that the Congress has refused to enact bills which would limit or outlaw sales commission plans in the oil industry.

Finally, an analogy to "tying" cases cannot justify the Commission's action. In the first place, the Commission did not rely on a "tying" theory, and the Court below could not properly rest its decision on that ground. In any case even assuming that Atlantic had deliberately tied Goodyear TBA to Atlantic's sale of its own products to its dealers (an assumption unsupported by findings of the Commission or by the record), there is no basis in precedent for abolition

of the sales commission plan itself. The remedy in "tying" cases has uniformly been to enjoin the "tie", not to bar a firm from continuing to sell or lease the two product lines which had been "tied". In contrast, the order here is not content to enjoin Atlantic from any pressure upon its dealers (an aspect of the order which Atlantic has not appealed to this Court), but goes on to prohibit both Atlantic and Goodyear from continuing to sell Goodyear TBA to Atlantic's dealers on a sales commission basis without any tying whatsoever. The "tying" case precedents thus provide no escape from the inexorable conclusion that there is no basis in precedent, fact or equity for the Commission's destruction of the sale commission plan between Atlantic and Goodyear.

II.

The Commission's order, approved by the Court below, seeks to prohibit Goodyear permanently from engaging in any sales commission arrangement with *any* oil marketing company—of which there were 156 listed in the year 1964 in an authoritative trade publication. The Commission's order exhibits this vehemence notwithstanding the fact that there is virtually nothing whatsoever in the record as to the "power" of oil marketing companies with respect to their dealers. In addition, there are no findings either as to the actual operations of Goodyear's sales commission plans with oil companies other than Atlantic or as to the actual relationship of any such company with its dealers.

For example, as to one oil company which had a sales commission arrangement with Goodyear at the date of the record, Shell, there is hardly any pertinent evidence in the record here. Despite the fact that Shell brought before the Court of Appeals for the Fifth Circuit a review of the

Commission's order barring Shell, *inter alia,* from continuation of its sales commission plan with Goodyear—on a record which at least purports to examine Shell's relationship with its dealers—the Commission's order in this case operates so as to prohibit Goodyear from continuing the plan with Shell. This is the case notwithstanding the fact that Shell is voiceless here on a determination which is vital to it and which does not even claim to be based upon a factual analysis of Shell's relations with its dealers.

As to marketing oil companies other than Atlantic with whom Goodyear had sales commission arrangements as of December, 1964—20 in number (of whom 14 are relatively small marketing oil companies)—there are also no findings to justify the Commission's result even on its own theory of oil company "power". The clearest example of this is Goodyear's plan with Texaco. The order bars Goodyear from a sales commission plan with Texaco because of the Commission's presumption of uniform oil company "power"—while at the same time Texaco, itself, under the decision of the Court of Appeals for the District of Columbia Circuit, is completely free to enter into such an agreement with Goodyear or any other rubber company because that Court decided that there was insufficient evidence in the record before it to justify any conclusion that Texaco had any such "power" over its dealers.

As to the 156 oil marketing companies with whom Goodyear is barred from sales commission arrangements, there is a complete evidentiary vacuum—a dramatic example of failure of proof. The Commission simply did not know enough about oil marketing companies to have issued the instant order. Indeed, the Commission has itself very recently acknowledged that it does not yet know enough about oil company marketing. On December 28, 1964 the Commission dismissed four cases then before it on the

specific grounds that it had insufficient knowledge of the "highly complex" facts involved in the competitive marketing of gasoline; that this "dynamic industry" undergoes rapid change and has altered significantly since the mid-1950's; and that the Commission should not enter orders "against a few oil companies" when such orders could not provide "complete or effective solution to the competitive problems of the gasoline industry." The Commission therefore dismissed the cases in order to concentrate upon "a comprehensive industry-wide approach to the problems of competition in the marketing of gasoline".

It is submitted that the Commission's reasoning is precisely applicable to this case—and that this proceeding should be dismissed because the Commission has made huge presumptions, on a stale and sparse record, about an entire industry as to which it has explicitly recognized a lack of sufficient knowledge.

III.

Apart from the substantive argument in the preceding two Points that the Commission has improperly sought to abolish a legal and proper economic practice, it is clear that the Commission fixed upon a remedy without performing its required functions.

Contrary to the decisions of this Court that an administrative agency must consider various alternative remedies, the Commission's opinion provides no stated basis why the order here could not be framed in less sweeping terms. On the Commission's own view of this case there were many remedial measures open to it falling far short of the broad-scale banishment which it fixed upon. Nowhere does the Commission explain why any of these measures would not provide solutions to the problems which it found to exist in sales commission arrangements. Open reasoning by the Commission as to appropriate remedies is particularly

called for here because at least four previous judicial determinations have left intact the right of an oil company to "sponsor" TBA products to its dealers.

The Commission's function is to tailor remedies to the faults which it finds. One of the chief purposes of the Congress in creating an administrative agency is to provide a body with expertise in the vitally important area of remedial action. It is submitted that the Commission has here failed utterly to exercise such expertise and has displayed instead an unskilled and insensitive approach to an important and beneficial method of distributing products. In so doing, the Commission did not perform the very functions which the Congress created it to exercise.

ARGUMENT.

I.

THE COMMISSION'S TOTAL ABOLITION OF GOODYEAR'S SALES COMMISSION PLAN WITH ATLANTIC VIOLATES CONTROLLING LAW.

A. The Commission Was Required to Weigh the Benefits and Consider the Economic Setting of the Sales Commission Plan.

There is now before this Court a new and raw formulation of an "unfair method of competition" under Section 5 of the Federal Trade Commission Act.

As put by the Solicitor General on behalf of the Commission, the question presented is the validity of the Commission's view that it is an unfair method of competition "for a major rubber company and a major oil company to enter into an agreement under which the oil company, in return for a commission, sponsors the sale of the rubber company's products to the oil company's retail dealers."*

* As already noted, the formulation should be even broader than the Solicitor General has phrased it, since the Commission has condemned as illegal (a) any such agreement by Goodyear with any

Petition, *Goodrich-Texaco,* p. 2. The primitive simplicity of the question's phrasing is apt, for the Commission permits no qualifications to its freshly-devised formula. Instead, it condemns the sales commission plan without considering the plan's manifest benefits to the American motorist, service station operators, oil companies and rubber companies.

As noted in the Statement, the existence of these benefits is uncontradicted. The Hearing Examiner found—and the Commission did not deny—that an Atlantic dealer "cannot profitably and successfully operate his business" without the sale of TBA "which also enables the dealer to give complete service to his customers"; that service stations are an important outlet to TBA manufacturers; and that the sale of TBA by Atlantic's dealers builds a stronger dealer organization and increases the sale of gasoline (R. 99-100).*

These benefits are especially significant when the plan is used to assist the dealers of smaller oil companies,

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and all marketing oil companies, small or "major", and (b) any such agreement by Atlantic with any rubber company, small or "major". Specifically, four of the oil companies with which the record shows Goodyear had sales commission arrangements—Anderson-Prichard Oil Company, Frontier Refining Company, Quaker State Oil Refining Corporation and Shamrock Oil & Gas Corporation—are undeniably "small" marketers of petroleum products. Furthermore, Goodyear's position among rubber companies is nowhere treated by the Commission as material to the lawfulness of sales commission plans in the oil industry—except for the Commission's unsupported (and in fact mistaken) assertion that "smaller tire companies are unable to compete with larger tire manufacturers for the business of oil companies using the sales commission plan" (R. 185).

* The Seventh Circuit freely found that sales of TBA were an "integral part of service station operations", aided stations in giving "complete service to motorists" and required that station operators be trained and kept informed of changes and production developments in TBA products. (R. 3685).

as was demonstrated here by Atlantic's decision to abandon purchase-resale (the alternative method of providing these benefits) when purchase-resale proved to be uneconomic and inefficient (R. 100-01, 2357-62, 2859-64, 239). Indeed, the basic facts of economic life—ignored by the Commission—are that small and medium-size oil companies are engaged in fierce competition with larger competitors and that the sales commission system is particularly well adapted to the needs of those smaller companies (and consequently their dealers) who may not be economically able to sustain the start-up costs and the continuing training, warehousing and distribution expenses of a purchase-resale system.

In spite of these considerations, the Commission chose to ignore the prior holdings of this Court that the advantages of and justifications for any business method under attack as possibly restraining trade must be carefully weighed and considered before that method can be condemned.* Indeed, the requirement that there be review and analysis of relevant economic data has been formulated by this Court in cases where the arrangements under appraisal, unlike the sales commission plan, were openly and obviously restrictive. For example, in *White Motor*

* It is submitted that in this respect the Sherman and Clayton Act holdings of this Court govern a Federal Trade Commission Act proceeding in which the Commission purports to find a "fundamental restraint of trade inherent in the sales commission system itself" (R. 157). The Commission's opinion does not argue that the Commission may totally ignore the requirement of these precedents. In any case, such an argument should fail—especially if, as here, it would endeavor to excuse the Commission's failure to consider the economic benefits and economic setting of a widespread method of product distribution which has been in effect for more than two decades (R. 1450). See *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427-28; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 647; Report of the Attorney General's National Committee to Study the Antitrust Laws, pp. 148-49 (1955); Oppenheim, *Guides to Harmonizing Section 5 of The Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821, 826, 836 (1961).

Co. v. *United States,* 372 U. S. 253 (1963), this Court said of the vertical territorial limitations imposed upon its distributors and dealers by White that such limitations "may or may not have that purpose or effect [*viz.,* the stifling of competition]."

> "* * * *We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain.* They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business (cf. *Brown Shoe, supra,* at 330; *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545, 560-561, *aff'd,* 365 U. S. 567) and within the 'rule of reason.' We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' (*Northern Pac. R. Co.* v. *United States, supra,* p. 5) and therefore should be classified as *per se* violations of the Sherman Act." (Emphasis added) (372 U. S. at 263).

The Court sent the case back for full development of the facts by the trial court because the "rule of reason" read into the Sherman Act by *Standard Oil Co.* v. *United States,* 221 U. S. 1, "normally requires an ascertainment of the facts peculiar to the particular business" (372 U. S. at 261).*

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* The requirement that a purported restraint be assessed against the background of "the facts peculiar to the business to which the restraint is applied" is of course applicable to cases across the entire antitrust spectrum. See, *e.g., Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238 (Section 2 of the Sherman Act); *United States* v. *American Tobacco Co.,* 221 U. S. 106, 180-83 (Sections 1 and 2 of the Sherman Act); *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U. S. 320 (Section 3 of the Clayton Act); *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 321-22, 324, 328-31 (Section 7 of the

Here the Commission has failed to consider the "economic and business stuff" out of which the sales commission plan has emerged. Indeed, the Commission's approach seems almost calculated to avoid coming to grips with the complex facts as to the intensely competitive market, or markets, in which TBA products are sold.*

Clayton Act); *United States* v. *Continental Can Co.*, 378 U. S. 441, 449 (Section 7 of the Clayton Act) ("Concededly these guidelines [to the definition of product market] offer no precise formula for judgment and they necessitate, rather than avoid, careful consideration based upon the entire record").

* In sharp contrast (and as more fully discussed in Point II hereof), the Commission has recently announced a "broad inquiry" into the problems of competition in the marketing of gasoline, the very industry under consideration here. The Commission specifically rejected any simplistic approach:

> "It is evident both from these submissions and from the Commission's experience in this industry in enforcing the laws which it administers that a broad, comprehensive, and industry-wide approach to the competitive problems of the industry is necessary, *and that specific remedial measures required in the public interest should not be attempted before obtaining a solid factual foundation in regard to the competitive conditions of gasoline distribution.* As the Supreme Court stated in a recent decision, proper and effective remedial action in this industry requires that the Commission make realistic appraisals of relevant competitive facts, *and these facts are highly complex.* The Commission has accordingly determined forthwith to institute an industry-wide inquiry into the competitive problems of marketing gasoline. The Commission intends to employ its flexible administrative powers of investigation and fact-finding as may be found necessary to assure *a complete, fair, and realistic understanding of the structure and dynamics of competition in the industry.*" (Emphasis added) *Statement of the Federal Trade Commission Announcing Broad Inquiry into the Problems of Competition in the Marketing of Gasoline* (December 30, 1964). (See Annex A hereto, p. 8).

B. The Commission's Postulate of Oil Company "Power" Was Used As a Substitute For Its Required Functions.

1. The Commission and the Court Below Relied Solely on the Postulate of "Power".

In condemning Goodyear's sales commission arrangement with Atlantic, both the Commission and the Court below relied exclusively on the conception that Atlantic had a special kind of "power" with respect to its dealers.

In so doing, both the Commission and the Court rejected the reasoned approach of the Hearing Examiner, who limited his entire remedy to an order barring Atlantic from any coercion of its dealers—after concluding there was evidence of some specific coercive acts by Atlantic representatives despite written Atlantic policy to the contrary (R. 103-08, 111-13, 120).* The Commission made little of coercion: coercive acts were "mere symptoms" of a fundamental "restraint of trade" growing out of Atlantic's economic power over its dealers (R. 156-57, 121, 181).

Thus, the Commission's entire approach to the sales Commission plan is based entirely on its notion of Atlantic's "economic power" over its dealers. Although the Commission explicitly states that the issue presented by the case is "the legality of * * * use [by Goodyear and Atlantic] of a *particular method* of distributing TBA products" (R. 181) (emphasis in original), the Commission's central finding is:

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* As noted in the Statement, the evidence as to coercion of dealers by Atlantic is sparse. However, the sufficiency of the record to support an order against coercing its dealers has not been raised in this Court by Atlantic, and the issue of coercion, which never had relevance to Goodyear or to the lawfulness of the sales commission plan, is now out of the case as it stands before this Court.

> "Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic". (R. 181).

The Seventh Circuit took the same view.

> "The heart of this case is the economic power Atlantic possesses over its service station dealers. * * * The keystone of the actual relationship between Atlantic and its dealers is the lease and the equipment loan contract with their short term and cancellation provisions. * * *
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> * * * * * *
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> "* * * The totality of facts surrounding the relationship between the oil company and the dealers points to one conclusion: the oil company is able to exert sufficient economic power over its dealers so that for all practical purposes they are required to carry sponsored TBA." (R. 3690, 3692-93).

The Commission's entire case rests therefore upon the premise—accepted by the Seventh Circuit—that short-term lease and equipment loan agreements outstanding between Atlantic and its dealers are such that the existence of an unlawful power in Atlantic to control its dealers' TBA purchases by mere sponsorship of a brand or brands of TBA is to be conclusively presumed.

2. The Goodrich-Texaco Decision.

It is at this point that the decision of the Court of Appeals for the District of Columbia Circuit in *Texaco, Inc. and The B. F. Goodrich Co.* v. *Federal Trade Commission,* 336 F. 2d 754 (D. C. Cir. 1964), comes into conflict

with the decision here. In the face of a record which indicated that Texaco has essentially the same kind of short-term lease and equipment loan agreements with its dealers* as those of Atlantic which were viewed as of paramount importance here, the District of Columbia Circuit nonetheless found "no basis in the record for the Commission's conclusion that Texaco has controlling economic power over its dealers" (336 F. 2d at 762). Indeed, that court specifically held that Texaco's contracts with its dealers "do not give rise to" such controlling economic power (*Ibid*).

The Solicitor General sees in the conflict between the opinions of the two courts "a fundamentally different conception of the nature of economic power in the oil industry" and concludes that "the different results in the two cases do not reflect merely the courts' respective evaluations of the different records" (Petition, *Goodrich-Texaco*, p. 14).

We agree that the two cases do not differ sufficiently in their facts to account for their flatly opposite results.**

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* There is no discussion by the Commission of how long a lease must be to be classed as something other than "short-term". Atlantic has leases running as long as three years (R. 99), whereas Texaco's leases are all apparently of one-year duration (336 F. 2d at 767).

** As Judge Washington points out in his dissent in *Goodrich-Texaco*, the record there contains such evidence of Texaco's "power" over its dealers as:

> "(a) one year leases and sales agreements, terminable at the year's end upon 10 days' notice; (b) substantial contractual control by Texaco over the use, maintenance and appearance of stations (the obligations imposed by Texaco, in addition to being evidence of Texaco's bargaining power, are means by which Texaco could prematurely terminate the lease through enforcement of one of those obligations, under cancellation provisions); (c) high personal investments by the lessees in their stations; (d) close dealer supervision by Texaco salesmen; (e) Goodrich's manifest understanding that Texaco controls its dealers (*e.g.*, Goodrich's books refer to the dealers as 'oil company controlled dealers'); (f) testi-

We also note that there was no evidentiary basis upon which the two courts could demonstrate "different conceptions of the nature of economic power in the oil industry". Whether *all* marketing oil companies have power to control the TBA purchases of their respective dealers has never been factually considered by the Commission—as is discussed in Point II below.

The District of Columbia Circuit does not deny that Texaco may be able to influence its dealers to purchase TBA sponsored by Texaco. The decision, rather, rules in effect that the relationship between Texaco and its dealers has not been shown to be such that the mere sponsorship by Texaco of a given brand or brands of TBA warrants the Commission to indulge in a conclusive presumption that oil company "power" is synonymous with substantial and illegal market "foreclosure".

3. The Commission's Presumption of "Foreclosure".

In so ruling, the District of Columbia Circuit contradicts the Commission's holding here. The Commission has conclusively presumed that all or substantially all of the TBA purchases made by Atlantic's dealers are of Goodyear TBA, that all of such purchases of Goodyear TBA

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mony of competing TBA suppliers that Texaco dealers felt they risked reprisal if they did not carry sponsored TBA, and (g) testimony of former Texaco dealers of the existence of a pattern of coercive conduct throughout their tenure." 336 F. 2d at 767.

In *Goodrich-Texaco*, the Commission also adopted the Hearing Examiner's conclusion that Texaco's "representatives have, in fact, attempted to and did coerce and force Texaco dealers to purchase substantial quantities of Goodrich and Firestone TBA." (Joint App. *Goodrich-Texaco* (No. 635), 226, 303). Just as in this case, however, the Commission's reason for holding Goodrich sales commission plans illegal does not depend upon a finding of coercion by Texaco. (Joint App. *Goodrich-Texaco* (No. 635), 302-03).

are the result of Atlantic's "power" and that competitors of Goodyear and its dealers are thus "foreclosed" from selling to Atlantic's dealers.

There is no factual finding which shows this presumption to be correct.*

Even assuming that the Commission were correct and that some "foreclosure" of others from the competition for Atlantic business were a result of the sales commission plan, the Commission was still required to determine and analyze the effects of any such foreclosure on the relevant market. Competition must be foreclosed in a substantial share of the line of commerce affected if a violation is to be found, as this Court made clear in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U. S. 320, 327-28:

> "*First,* the line of commerce, i.e., the type of goods, wares, or merchandise, etc. involved must be determined, where it is in controversy, on the basis of the facts peculiar to the case. *Second,* the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies. In short, the threatened foreclosure of competition must be in relation to the market affected.
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> * * * * * *
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> "*Third,* and last, the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited * * *."

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* Moreover, there is nothing in the sales commission agreement which gives Goodyear the right to deal exclusively with Atlantic or its dealers. If any Atlantic dealer chose to deal primarily in Goodyear TBA, the decision to do so was made independently of any requirements by Goodyear or the sales commission agreement.

Since the Commission described in terms of "foreclosure" the deleterious "effects" it relied upon (R. 182-86), the standards set out in *Tampa Electric* are clearly applicable. None of these was met: there has been no determination of the line or lines of commerce involved, no definition of the area of effective competition and no measurement of what share of that competition, if any, was foreclosed.

a. *Line or lines of commerce.* Since this is a TBA case, presumably the line or lines of commerce in which any effects are to be measured involve the sale and distribution of TBA. However, the Commission made no determination whether all sales of TBA to motorists constitute a line of commerce,* whether the sale of tires to motorists constitutes a distinct line of commerce but the sale of batteries and accessories to motorists can be broken down into numerous separate and distinct lines of commerce, or which of the almost innumerable other possible combinations and permutations properly can describe the line or lines of commerce in this case.

As this Court has stated of a claimed violation of the Clayton Act, "determination of the relevant market is a necessary predicate to a finding of a violation . . . because the threatened monopoly must be one which will substantially lessen competition 'within the area of the effective competition.' Substantiality can be determined only in terms of the market affected." *United States* v. *E. I. du Pont de Nemours,* 353 U. S. 586, 593 (1957) (footnote omitted). The Commission's opinion does not attempt to define the market with which this case is concerned.

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* Service station sales of TBA—noted by the Commission as constituting an increasingly important source of TBA sales (R. 122)—may have changed since the date of the record. At least as to sales of replacement tires, service stations appear to have lost ground to their competitors in recent years (Factbook Issue, Mid-May 1964, *National Petroleum News,* 230).

b. *Area of effective competition.* Again violating the precepts of *Tampa Electric,* the Commission does not even attempt to chart "the area of effective competition in the known line of commerce * * * in which [Goodyear or its supply points operate], and to which [Atlantic or its dealers] can practically turn for supplies" (365 U. S. at 327). The "foreclosure" relied on by the Commission is purported foreclosure of (1) other TBA manufacturers from competing for the business of selling to Atlantic and its dealers, (2) other manufacturers' wholesalers from selling to Atlantic's dealers, and (3) Goodyear's dealers who do not function as supply points from competition for the business of Atlantic's dealers (R. 182-86).

On this basis, any manufacturer of tires, batteries or automotive accessories anywhere in the country who sells or is willing to sell its products within the 17-state area in which Atlantic has stations is someone to whom Atlantic or its dealers could reasonably turn for such products. Whether shipping problems or other factors dictate who can effectively sell tires, batteries or accessories to Atlantic and its dealers is the kind of question not answered by the Commission.

As for the purported foreclosure of other wholesalers (whether wholesalers of non-Goodyear TBA or Goodyear dealers who are not supply points*) from competing

* There is no finding and no evidence that any competent Goodyear dealer was ever denied the opportunity to become a supply point for Atlantic's dealers (or for any of the dealers of any other oil company under any other sales commission agreement); nor is there any finding or evidence that any such Goodyear dealer who was not a "supply point" was interested in becoming one. The Commission has persistently ignored the fact that not all Goodyear dealers have the kind of operation necessary to the job required of a supply point. A supply point receives no special compensation for participation in the sales commission plan, and must maintain larger inventories and provide a broader range of services than are usually maintained and provided by other Goodyear dealers who do not perform that function (R. 524-25).

for the business of Atlantic's dealers, the identity of the innumerable competitors possibly involved is left a complete mystery. There are no data at all.*

c. *Substantiality of the competition foreclosed.* Finally, the Commission has made no effort to determine whether the competition allegedly foreclosed constitutes a substantial share of the relevant market or markets. This failure is *a fortiori* since there is no information as to what the relevant market is, how big it is, or what portion of it has in fact been foreclosed, if any. Information available in the record does show, however, that Goodyear TBA sales under its agreement with Atlantic totaled somewhat less than \$6,000,000 in 1955 (R. 133). The annual national replacement TBA market, for a share of which all TBA manufacturers compete, is estimated to have been \$4,000,000,000 in the mid-1950's (R. 3103, 415); thus the maximum share of that market that could have been foreclosed by the Goodyear-Atlantic agreement—even on the Commission's own untenable theory—is roughly 15/100 of 1%.

What all this comes down to is simple. To talk of market foreclosure in the vacuum created by the Commission's total failure to analyze and determine relevant markets and the competition therein is to reject entirely the careful standards and sensitivity to fact developed by this Court in a long line of antitrust cases whose teachings are applicable here.

* Thus, if in a given geographic area there are 20 Atlantic dealers who compete with 400 other stations, 20 tire stores, 3 large department stores, 3 discount houses and several retail stores of giant mail order chains in the sale of TBA at retail, and these dealers buy a substantial share of their total TBA requirements from a Goodyear supply point rather than from 25 other tire wholesalers, dozens of auto parts dealers and various occasional wholesale sellers of one or more TBA items, a determination of the area of competition for purchases by those 20 Atlantic dealers requires careful economic analysis. No attempt at such analysis has been made by the Commission in any possible market.

It is submitted that the Commission's presumption of "foreclosure" based on Atlantic "power" utterly fails to pay heed to the admonitions of this Court.

4. The Inherent Contradictions in the Commission's Approval of Purchase-Resale.

The Commission has also failed to evaluate the functions served by the sales commission plan, particularly in the case of smaller and medium-size oil companies like Atlantic. As noted, Atlantic originally abandoned purchase-resale and entered into sales commission agreements with Goodyear and Firestone because it was convinced that it could not economically provide high quality TBA for its dealers through its own distribution of products which it lacked the facilities and experience to handle (R. 100-01, 2357-62, 2859-64, 239). Yet now Atlantic is to be barred from the alternative method of distribution under which it has been able to achieve that very goal which the Hearing Examiner and the Court below found to be beneficial to dealers, service station operators and oil companies—the provision of high-quality TBA to service station operators trained in their use and sale (R. 114-16, 99-100, 3685).

This paradox in result is also present in the Commission's reasoning. It holds that Atlantic's "power" renders the sales commission plan illegal. But surely that "power" would not cease to exist if Atlantic were relegated to the purchase of TBA for resale to its dealers. Indeed, the Commission proffers nothing to support its silent assumption that the "power" would recede if each Atlantic salesman were himself to be selling, and not merely recommending, TBA.

The Commission's justification* for this incongruity is that there may be some tire, battery or automotive accessory

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* The Commission also argues that under a sales commission plan the supply points of a rubber company "are assured of a substantial chunk of the market before the competitive race at the

manufacturers who—because of their more limited distribution facilities—are less able to compete for the business of Atlantic's individual dealers than they are to compete for the business of Atlantic. In short, the Commission has issued an order under which "competition for the business of the individual service station is [to be] replaced by competition for the oil company's domination of its dealers", the very thing condemned as anticompetitive by the Seventh Circuit in striking down the sales commission plan (R. 3695).

The Commission's emotionally-charged references to "smaller tire companies" and "smaller competitors" are misleading, for the Commission did not prove—nor could it—that small rubber companies do not have sales commission agreements with oil companies. In addition, as already noted, the Commission failed to consider the effect upon smaller oil companies and *their* dealers of banning a sales commission plan. In any case, a method of competition has never been held illegal heretofore simply because one company was able to offer a broader range of products and service than another.

C. Under Congressional Policy, Oil Company "Power" is No Basis for Abolition of a Sales Commission Plan.

The Commission's entire approach in establishing a conclusive presumption of illegality based upon Atlantic's purported power over its dealers, rather than upon any

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wholesale level even begins" (R. 184). This is faulty reasoning, for under purchase-resale the petroleum company would be assured of the same "substantial chunk" at the start of the race.

Moreover, the adoption of purchase-resale by Atlantic and other oil companies with which Goodyear now has sales commission agreements would have the additional effect, under the Commission's own rationale, of "foreclosing" from competition for the business of the dealers of Atlantic and the other oil companies at least the 1,209 independent small businessmen who, as Goodyear supply points, presently sell to such gasoline dealers (R. 173).

acts by Atlantic with respect to its dealers, also conflicts with a clear expression of Congressional policy. In the mid-1950's there was much concern over the power which automobile manufacturers had to influence the purchase by their franchised dealers of cars and other products. In 1956, Congress responded to this concern by enacting, as a declared "supplement" to the antitrust laws, the so-called Automobile Dealers' Day in Court Act, 70 Stat. 1125 (1956), 15 U. S. C. §§1221-25 (1958).

Under that Act an automobile dealer was given the right to sue in the district courts for damages if his manufacturer failed

> "... to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise with said dealer." (28 U. S. C. §1222).

Good faith was defined in the act as follows:

> "The term 'good faith' shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.*"* (Emphasis supplied.) (28 U. S. C. §1221(e)).

* Congress appears to have taken the emphasized language from, and thus in a sense to have adopted, the trial court's charge in *United States* v. *General Motors Corp.* (*affirmed* at 121 F. 2d 376 (7th Cir. 1941), *cert. denied*, 314 U. S. 618), portions of which are set out at length in this Court's decision in *Ford Motor Co.* v. *United States*, 335 U. S. 303. In those instructions, the trial court told the jury it was not unreasonable for General Motors to have a finance company and to recommend its use to its dealers. In his charge, he commented, as follows, upon the Government's theory that General Motors' power to refuse to renew dealer contracts

The economic "power" of an automobile company vis-a-vis its dealers is surely no less than the power of an oil company vis-a-vis its service-station operators. Yet, in the dealers' statute, Congress plainly held that an auto-

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was used as a club upon dealers to force them to use the finance company:

> "[The Government] can only complain if the defendants do sufficient of these acts charged in the indictment as constitute duress upon the dealer to accomplish a result that would have otherwise not have been accomplished, and to make a dealer do something that he would not have done of his own free will.
>
> "That, almost, is the question in this case—whether the dealer could act as a free man; whether he could act of his own free will.
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> * * * * * *
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> "You know, you have heard of the terms:
>
> "Exposition;
> "Persuasion;
> "Argument;
> "Coercion.
>
> "They are different steps. They are graduated steps that I suppose every salesman goes through, except perhaps the last.
>
> "In exposition one may expound the merits of that which he has to sell; he may explain its nature and by his exposition make a clear picture of what he has.
>
> "By persuasion he may endeavor to persuade the person to whom he is talking to accept that which he has to offer.
>
> "There is little advancement in his further progress, to argue.
>
> "Persuasion means something softer than argument, perhaps, but he may argue with him, and argue with him the respective merits of his product and other products being offered to the person to whom he makes his offer.
>
> "All of these are proper.
>
> "He may not go beyond that and use something that is within his power to use as a club to coerce the person to accept that which he has to offer.
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> * * * * * *
>
> "You must remember that, after all, this coercion, if you find that coercion exists, then the ultimate question is: Has that resulted in unreasonable restraint of interstate commerce? And that is a question for you to determine from all of the evidence." (335 U. S. at 317 n-18 n).

mobile company might actively attempt to persuade its dealers to buy, provided that the influence was employed in a non-coercive way.

The legislative history of the statute makes clear the contemplation that the statute could serve as a precedent for use in other industries such as the petroleum industry. See H. Rep. Committee on the Judiciary, Antitrust Subcommittee, Hearings on H. R. 11360 and S. 3879, 84th Cong., 2d Sess. (1956).

A bill identical in all material respects to the Automobile Dealers' Day in Court Act, but aimed at oil companies, was introduced in the House the following year. See H. R. 425, 85th Cong., 1st Sess. (1957). At least two bills intended to outlaw the sales commission plan have been introduced. See H. R. 428, 85th Cong., 1st Sess. (1957), and H. R. 9894, 86th Cong., 2d Sess. (1960). Similarly, there have been bills aimed at purchase-resale, see H. R. 5926, 87th Cong., 1st Sess. (1961); S. 2480, 87th Cong., 1st Sess. (1961), and at exercise of dominion with respect to the reselling of gasoline or petroleum products as well as TBA, see H. R. 426, 85th Cong., 1st Sess. (1957). The Congress has chosen not to act.

The Commission has here set its face against this history and has issued a legislative declaration of illegality contradicting the Congress itself.

D. The Analogy to Tying Cases is Improper.

By their references to "tying" cases, the Commission (R. 179-81), the Court (R. 3690, 3693-95) and the Solicitor General (Petition, *Goodrich-Texaco*, pp. 15, 20) each indicate that their real concern lies with oil company power—and not with the sales commission plan. Thus, the Commis-

sion argues from its finding that Atlantic "has used its power as a major wholesale and retail distributor of gasoline and as a lessor of numerous valuable retail gasoline distribution facilities to cause its dealers to purchase" TBA that this "would appear to bring this case within" *Northern Pac. Ry. Co.* v. *United States,* 356 U. S. 1, and *Osborn* v. *Sinclair Refining Co.,* 286 F. 2d 832 (4th Cir. 1960), *cert. denied,* 366 U. S. 963 (R. 179). However, it goes on to say that "we do not rest our decision on a mechanical application of the rule of the *Northern Pacific* and *Osborn* cases" (R. 181).*

But the difficulty with the tying argument is not simply mechanical; it is basic. As the Seventh Circuit points out, "Goodyear's contract in itself has no tying features" (R. 3694). Any tie, if it exists at all, is a tie of the sale of TBA to Atlantic's ability to sell gasoline and to make gasoline distribution facilities available to its dealers pursuant to leases and equipment loan agreements.

If Atlantic were to make an absolute condition to any lease or loan agreement or sale of its petroleum products to a dealer that the dealer purchase Goodyear TBA (or Firestone TBA, or Atlantic TBA under a purchase-resale method of distribution), such an arrangement might amount to an unlawful tying agreement, assuming the requisite effects upon competition. But unlawful for whom? It is clear that the tie would result purely from Atlantic's act, not from anything having to do with Goodyear.

In any event, the way to eliminate an unlawful tying arrangement is to enjoin the tie. In *Northern Pacific* an injunction was entered against the railroad's continuing

* Under this Court's decision in *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U. S. 80, this explicit refusal to rely upon tying would appear to bar any argument now that the Commission's decision could be affirmed on a tying theory; but *cf.* Petition, *Goodrich-Texaco,* pp. 15, 20.

any condition in its leases requiring its lessees to use its shipping facilities in preference to other railroads. The railroad was not enjoined from continuing to lease property; it was not enjoined from continuing to engage in carriage by rail; nor was it enjoined from continuing to lease property and to furnish carriage by rail to the same persons. Similarly in *International Salt Co.* v. *United States,* 332 U. S. 392, the defendant was enjoined from tying the rental or sale of its patented machines to the sale of its salt but not from furnishing machines, from selling salt or from both. The "power" which the railroad derived from its ownership of specific real property and the "power" which the salt company derived from its patent monopoly are surely no less than the "power" of General Motors over its dealers or of Atlantic over its.*

The distinction between unlawful tying and the lawful conduct which the Commission seeks to proscribe in this case is also evidenced in *Osborn* v. *Sinclair Refining Company,* 286 F. 2d 832 (4th Cir. 1960), *cert denied,* 366 U. S. 963, a case relied upon by the Commission (R. 179-81), the Seventh Circuit (R. 3693-94), and the Solicitor General (Petition, *Goodrich-Texaco,* p. 20). The plaintiff Osborn, a former lessee-operator of a service station,

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* Similarly, in other cases in which this Court found an illegal practice upon a tying theory, the order banned only the coercive activity, despite "power" in each instance no less than that which Atlantic may have. In no case was the company ordered to restrict production or sale of the tying or tied product. *United States* v. *Loew's Inc.,* 371 U. S. 38; *Jerrold Electronics Corp.* v. *United States,* 365 U. S. 567; *International Business Machines Corp.* v. *United States,* 298 U. S. 131; *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 456-57. In *United States* v. *Paramount Pictures,* 334 U. S. 131, this Court said:

> "We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted." (334 U. S. at 159).

brought suit against Sinclair charging his former supplier-lessor had violated Sections 1 and 2 of the Sherman Act by requiring him to purchase Goodyear TBA and eventually cancelling his lease when he refused.

The Court saw the question before it as "whether there existed between Sinclair Refining Company and its customers an illegal tying arrangement prohibited by Section 1" (286 F. 2d at 834); it concluded there was illegal tying both because such illegal conduct might be inferred from the facts present and because one lease to Osborn "was actually made in pursuance of an express oral agreement to purchase Goodyear TBA" (286 F. 2d at 836-37). What concerned the Court was not the oil company's power but its use of pressure and coercion:

> "Of course, a seller may attempt to persuade a buyer to purchase his products rather than those of his competitors, and such salesmanship efforts do not run afoul of the anti-trust laws, unless the sale of one product (the tying product) is made under an agreement, arrangement or condition under which the buyer must also purchase another (the tied) product.
>
> * * * * * * *
>
> "* * * Sinclair-Sherwood's efforts to induce their dealers to carry a substantial quantity of Goodyear TBA went beyond mere persuasion or salemanship to effectuate Sinclair-Sherwood's policy and constituted an actual requirement and condition for the continued sale of gasoline under their leases." (286 F. 2d at 836).

It is submitted that this Court and the Court in *Osborn* have consistently viewed tying as a problem of *abuse* of power; that the Hearing Examiner was faithfully applying precedent and common sense when he confined the remedy to prohibition of coercive acts by Atlantic; that the Com-

mission in effect recognized that "tying" analogies gave it no basis for absolute prohibition of a sales commission plan; and that the Commission's order may not now derive sanction from tying analogies.

Conclusion.

The Hearing Examiner was clearly correct when he concluded that it was proper for Atlantic to "sponsor" TBA and thus seek to persuade its dealers in their TBA purchases—so long as Atlantic itself did not engage in improper behavior such as coercion or tying. The Commission and the Court below refused to adopt that eminently sound approach, substituting for it a simple quantitative test of illegality which treats actual conduct as irrelevant and ignores the many justifications for using the sales commission method to distribute TBA.

The decision under review is thus a departure from the antitrust mainstream, an effort to avoid the careful economic analysis and weighing of alternatives which this Court has consistently required. To permit the Commission's decision to stand would be to acquiesce in the Commission's assuming for itself the right to condemn business conduct as illegal *per se* without concern for either fact or law. This Court should reverse.

II.

EVEN IF THE COMMISSION'S ABOLITION OF THE GOODYEAR-ATLANTIC SALES COMMISSION PLAN WERE PROPER, ITS PROHIBITION OF ALL GOODYEAR PLANS WITH ALL OIL COMPANIES IS COMPLETELY UNWARRANTED.

The preceding Point I urges that the Commission could not properly abolish the sales commission arrangement between Goodyear and Atlantic. This Point II demon-

strates that, in any event, the Commission had neither factual nor legal basis for its far broader prohibition barring Goodyear from all sales commission plans with all oil companies.

The Commission's opinion is void of information about Goodyear's sales commission agreements with oil companies who were not respondents in this proceeding. The only specific references by the Commission to such agreements are as follows: (a) claimed coercion by Sinclair-Sherwood of two of its dealers in 1948 (R. 162-64), (b) a tabulation showing the number of Goodyear supply points servicing the dealers of nine non-respondent oil companies (R. 173), (c) the dollar amount of Goodyear's total TBA sales to dealers of a group of non-respondent oil companies under sales commission plans in the two years 1951 and 1955 (R. 162), and (d) a naked finding that Goodyear's agreements with other oil companies "are in all material respects identical with the Goodyear-Atlantic contract" (R. 162). The Commission made no effort to show that the sales commission plans as implemented by other oil companies were in any respect comparable to the Atlantic plan as implemented.*

As to other oil companies, there are no findings whatsoever as to the following:

a. How the sales commission plan with each of them works in actual practice;

b. The terms of, and the actual operations under, the oil company's contractual arrangements with its retail outlets

* The non-respondent petroleum companies with which Goodyear has sales commission agreements present a variety of different situations which the Commission has simply swept under the rug. The companies are of different sizes, operate in different areas, face different competitors, have different positions in their respective markets, provide markets for differing amounts of TBA, operate with different types of dealer outlets, etc.

(although, in the case of Atlantic, the Commission and the Court below found such arrangements to be the "keystone of the actual relationship between Atlantic and its dealers" (R. 3690));

c. How each oil company selects its dealers or how, if at all, it operates or participates in dealer training schools, dealer meetings, tire clinics, promotional programs, coöperative advertising or quota systems, or otherwise promotes the sale of Goodyear TBA;

d. How each company deals with initial stocks of TBA, check-out of dealers, the selection of supply points, TBA display, station identification, or non-sponsored products.

This failure of proof is emphasized by the procedural posture of this matter. For example, the Commission's order before this Court prohibits Goodyear, *inter alia,* from a continuation of its sales commission plan with Shell, although there is virtually no pertinent evidence in the record here. Yet there is still *sub judice* before the Fifth Circuit the very issue whether Shell should be permitted to continue its sales commission plans generally, including that with Goodyear. It is in that latter case, not this, that the Commission had the opportunity to examine Shell's relationship with its dealers—the Commission's own touchstone of legality of a sales commission plan. It is in that case, not this, that Shell's rights should be decided. But the Commission has so framed its order in this case that Shell is to be voiceless in a determination which affects its vital interests and which lacks the factual foundation necessary to such determination. This bizarre result is not alone a showing of unfairness to Shell; it is an irrefutable demonstration that the Commission's order in this case ranges destructively far beyond the record before it.

Nor is this all. Beyond the lack of findings as to oil companies other than Atlantic with whom Goodyear had sales commission arrangements at the date of the record, there is a further vacuum. The order is not content to nullify Goodyear's sales commission plans as of 1956: it bars Goodyear from entering into any sales commission plan with any marketing oil company at all in the future, without knowledge of that company's size, that company's actual relations to its dealers or the economic factors which this Court has ruled to be the governing criteria in antitrust cases.*

Thus, the Commission's order would void Goodyear's sales commission arrangements as of December, 1964 with 21 marketing oil companies (including Atlantic).** Most of

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* Goodyear is thus to be barred from sales commission arrangements with at least 156 companies engaged in the marketing of petroleum products in 1964 (Factbook Issue, Mid-May 1964, *National Petroleum News,* 66-71).

** American Petrofina Company of Texas
APCO Oil Corporation (formerly Anderson-Prichard Oil Corporation)
Ashland Oil & Refining Company
Atlantic Refining Company
Champlin Petroleum Company
Cities Service Oil Company
Crown Central Petroleum Corporation
Frontier Refining Company
Husky Oil Company
Kerr-McGee Oil Industries, Inc.
Leonard Refineries, Inc.
Murphy Oil Corporation
Pennzoil Company (South Penn)
Quaker State Oil Refining Corporation
Shamrock Oil & Gas Corporation
Shell Oil Company
Skelly Oil Company
Sunray DX Oil Company
Tenneco Oil Company
Texaco, Inc.
Vickers Petroleum Company, Inc.

Goodyear also has sales commission agreements limited to "accessories" alone with Richfield Oil Corporation and Sinclair Refining Company.

these companies are not "major" oil companies—14 are not deemed to be among the largest marketing oil companies (21 or 22 in number) in terms either of total assets* or daily average refinery runs.**

The Commission's catch-all prohibition as to the future after 1956 has an ironic twist. One of the 21 companies with whom Goodyear now has a sales commission arrangement is Texaco (which has non-exclusive sales commission agreements with Firestone, Goodrich and United States Rubber Company as well). The Commission has thus held that it is unlawful for Goodyear to have a sales commission agreement with Texaco because of a presumed "power" by Texaco over its dealers, while at the same time Texaco itself, under the decision of the District of Columbia Circuit, is completely free to have such an agreement with Goodyear or anybody else because there was insufficient evidence in the *Goodrich-Texaco* case to establish that Texaco had any such power over its dealers. If this case involved coercion or other abuses by Goodyear, such a result might have a faint tinge of rationality (although it would be a rationalization only the Commission itself could provide, as is clear from *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80). Since, however, the only basis here put forward by the Commission for branding the sales commission plan unlawful is a presumption of power by all oil companies over their

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* *The Oil and Gas Journal*, April 13, 1964, pp. 48-49.

** *The Oil and Gas Journal*, July 13, 1964, pp. 49-51. Of the 21 companies with which Goodyear has sales commission plans as of December, 1964, two had refinery runs in 1964 which exceeded 400,000 barrels per day; four had refinery runs of 100,000 to 400,000 barrels per day; two of 50,000 to 100,000 barrels per day; two of 40,000 to 50,000 barrels per day; two of 30,000 to 40,000 barrels per day; five of 20,000 to 30,000 barrels per day; two of 10,000 to 20,000 barrels per day; and two under 10,000 barrels per day. (*Ibid.*)

dealers, it is ridiculous to contend that it is unlawful for Goodyear to deal with Texaco after the Commission has tried but failed to show that Texaco has the requisite power.

Even assuming *arguendo* that the District of Columbia Circuit was wrong in concluding that the record in *Goodrich-Texaco* did not support a finding that Texaco has the requisite "power" over its dealers, that Court was at least absolutely correct in determining that the evidence for the finding should be assessed. Clearly, the existence of oil company "power" is, in each individual case, a matter of fact to be determined on a record. The Commission cannot properly determine the relationship of each company in the entire oil industry to its own particular dealers simply by purporting to examine the relationships between each of three oil companies and their respective dealers. For example, merely the gross disparity in size between Texaco on the one hand and Quaker State on the other* may or may not have anything to do with the power either can, or does in fact, exercise over its dealers, but the Commission has not even considered the possibility that such differences do exist in the oil industry. Moreover, Atlantic's experience with purchase-resale indicates that small marketing oil companies have no feasible alternative to sales commission distribution of TBA.

The Seventh Circuit treated in a brief paragraph the Commission's failure of proof as to the entire range of oil companies, small, medium or large, embraced and vitally affected by the Commission's order:

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* Texaco's refinery runs for the year ended March 31, 1964 averaged 724,191 barrels per day; Quaker State's refinery runs averaged 9,049 barrels per day for the some period. (In this respect Texaco was second in the nation while Quaker State was sixty-eighth.) *The Oil & Gas Journal*, July 13, 1964, pp. 49, 51.

"We think the Supreme Court answered petitioners' contentions in *F. T. C.* v. *Ruberoid Co.*, 343 U. S. 470, 473 (1952), when it said:

" 'Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity.' " (R. 3696).

Ruberoid has no application to the issue here. The quotation in *Ruberoid* was in answer to a contention by Ruberoid that the Commission could not interdict admittedly illegal behavior in which the company had not specifically engaged. Significantly, the Court went on to point out that the company was not being prevented from engaging in lawful acts (343 U. S. at 473-76). Here, the Commission did not bar Goodyear from sales commission agreements with all oil companies as a matter of *remedy* addressed to a "transgressor". Rather, it grandly assumed that oil company "power" over dealers permeated the entire oil industry and barred Goodyear on the reasoning that a sales commission arrangement by any oil company would necessarily result in a violation of Section 5. Thus, the issue is whether the sales commission plan is an unfair trade practice at all when Goodyear engages in it with companies which do not have (or have not been proven to have) the power over their respective dealers which is the *sine qua non* of the Commission's unique new formulation of an

unfair method of competition. Whatever the purported evidence as to Atlantic, neither *Ruberoid* nor the Seventh Circuit nor the Commission sheds any light on why the Goodyear sales commission plan should be unlawful when used with any other marketing oil company in the country.

The Commission's order here is all the more remarkable because within the past month the Commission has specifically recognized that it does not know enough of the "highly complex" facts as to competitive conditions in the marketing of gasoline; that this "dynamic industry" changes rapidly and has significantly altered since a record which was closed in the 1950's; and that the Commission would forego "specific remedial measures" against "a few oil companies" before it obtained a "solid factual foundation" on an industry-wide basis.

In a situation involving marketing oil company cases growing out of practices with respect to dealers faced with gasoline price wars, the Commission's recent order held:*

> "(1) * * * The specific practices challenged in these cases occurred almost a decade ago, in the mid-1950's, and competitive conditions in this dynamic and rapidly changing industry appear to have altered significantly since then.
>
> "(2) The Commission has this date announced the initiation of a broad inquiry into the problems of competition in the marketing of gasoline. *Orders to cease and desist entered against a few oil companies—orders which would probably not become final, if at all, until completion of lengthy review proceedings in the Federal Courts of Appeals and the Supreme Court—could not provide complete or*

* *Pure Oil Company*, FTC Docket No. 6640; *The Texas Company*, FTC Docket No. 6898; *Standard Oil Company (Indiana)*, FTC Docket No. 7567; *Shell Oil Company*, FTC Docket No. 8537 (December 28, 1964).

effective solution to the competitive problems of the gasoline industry. It would appear to be more desirable, from the standpoint of effective administration of the law, that the Commission concentrate its necessarily limited resources on a comprehensive industry-wide approach to the problems of competition in the marketing of gasoline." (Emphasis supplied.)

(That order by the Commission, the dissent by Commissioner MacIntyre and an accompanying "Statement of the Federal Trade Commission Announcing Broad Inquiry Into The Problem of Competition In The Marketing of Gasoline" are set out as Annex A hereto.)

The statement announcing the Commission inquiry specifically recognizes that the Commission lacks expertise in petroleum marketing:

"The Commission has received a large number of inquiries, complaints, and petitions from various groups in the gasoline industry, from members of Congress, and from members of the consuming public, with respect to competitive problems in the marketing of gasoline. *It is evident both from these submissions and from the Commission's experience in this industry in enforcing the laws which it administers that a broad, comprehensive, and industry-wide approach to the competitive problems of the industry is necessary, and that specific remedial measures required in the public interest should not be attempted before obtaining a solid factual foundation in regard to competitive conditions of gasoline distribution.* As the Supreme Court stated in a recent decision, proper and effective remedial action in this industry requires that the Commission make realistic appraisals of relevant competitive facts, and these facts are highly complex. The Commission has accordingly deter-

mined forthwith to institute an industry-wide inquiry into the competitive problems of marketing gasoline. The Commission intends to employ its flexible administrative powers of investigation and fact-finding as may be found necessary to assure a complete, fair, and realistic understanding of the structure and dynamics of competition in the industry." (Emphasis supplied.)

The Commission's present view that "proper and effective remedial action in [the petroleum marketing] industry requires that the Commission make realistic appraisals of relevant competitive facts" contradicts the course the Commission has pursued in this case. Its present recognition of the complexity of the markets with which this case is concerned and of the need for industry-wide data about "the structure and the dynamics of competition in the industry" is an unintended concession that there is no basis in the empty and stale record of this case for a conclusion that the sales commission plan cannot ever be legal if entered into with any oil company.

As is clear from Point I, *supra,* no realistic appraisal of relevant facts has been made by the Commission in the case of Atlantic. As for all other oil companies—whether they have sales commission plans with Goodyear or not—there is no appraisal at all. There is here not a mere inability to meet the proper standards of proof but a complete failure to find evidence of unlawfulness.

It is submitted that this Court should take stock of the Commission's present acknowledgment—more than eight years after the date of the record here and close to four years after the date of its order here—that it lacks sufficient knowledge of the relevant facts in the marketing of gasoline: this proceeding should be dismissed.

III.

IN FIXING ITS REMEDY, THE COMMISSION FAILED TO PERFORM THE DUTIES WHICH THE CONGRESS AND THIS COURT HAVE HELD TO BE ESSENTIAL.

Quite apart from the substantive argument in the preceding two Points that the Commission seeks to bar a legal and proper economic practice, it is clear that the Commission fixed its remedy without performing the functions which this Court requires of an administrative agency in the determination of an appropriate remedy.

Nowhere in its opinion does the Commission indicate that it gave consideration to an order more limited and specific than the order here. Instead there is the stubborn failure of the Commission to consider the benefits of the sales commission plan, to weigh any remedy short of flat abolition or to set out reasons why less Draconian relief would not suffice. Still, the requirement that an order by the Commission be reviewable is a requirement that there be a stated basis for the order, including reasoned explanation why the order could not be framed in less sweeping terms.

The importance to a reviewing court of an agency's articulation of the rationale underlying choice of remedy is forcefully set out in this Court's decision in *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608. In that case the Court held that the Commission had erred in ordering an outright prohibition of any use of a trade name which it had found to be deceptive; the Commission should have first considered whether measures short of so drastic a remedy would effectively eliminate the deception. The Court stated:

> "For the Commission seems not to have considered whether in that way the ends of the Act

could be satisfied and the trade name at the same time saved. We find no indication that the Commission considered the possibility of such an accommodation. It indicated that prohibition of the use of the name was in the public interest since the cease and desist order prohibited the use of the name. But we are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate." 327 U. S. at 613.

The basis of the holding was put as follows:

> "[The Commission's] expert opinion is entitled to great weight in the reviewing courts. But the courts are not ready to pass on the question whether the limits of discretion have been exceeded in the choice of remedy until the administrative determination is first made." 327 U. S. at 614.

The Court recently affirmed this rule in two cases reviewing orders of the Interstate Commerce Commission, *Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115 and *Burlington Truck Lines* v. *United States*, 371 U. S. 156. In each instance the Court approved the Commission's holdings as to statutory violation, but remanded for the Commission's consideration of remedies less harsh than those adopted. In *Gilbertville*, where divestiture of an individual's stock interest in a corporation had been ordered, this Court said:

> "* * *the choice of remedy is as important a decision as the initial construction of the statute and finding of a violation. The court or agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives just described. *Cf. Hecht Co.* v. *Bowles*, 321 U. S. 329-331.
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> * * * * * * *

> "By referring to these mitigating considerations, we have no intention of prejudging the Commission or implying that divestiture would be unwarranted after proper treatment of the issue. These considerations merely indicate that a doubt can be raised and that a remand to the Commission is not purely academic for the sake of procedural regularity. When the Commission has exercised its judgment and issued its considered opinion, the propriety of the remedy chosen will be ripe for review. *Jacob Siegel Co.* v. *Federal Trade Comm'n, supra;* Administrative Procedure Act, §8(b), 60 Stat. 242, 5 U. S. C. §1007(b)." 371 U. S. at 130-31.

In *Burlington*, the Commission had concluded that certain union-induced refusals to accept or deliver traffic from or to particular carriers or shippers were illegal and resulted in serious inadequacies in the service available. The Court agreed. However, the Commission chose to remedy the situation by certificating additional carriers. The Court remanded for the Commission to consider whether a cease and desist order addressed specifically to the discriminatory practices would have cured the violation:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. See *Siegel Co.* v. *Federal Trade Comm'n,* 327 U. S. 608, 613-614. Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York* v. *United States,* 342 U. S. 882, 884 (dissenting opinion)." 371 U. S. at 167 (footnote omitted).

The facts are even stronger here than those present in *Siegel, Gilbertville* and *Burlington*. The value of the trade name in *Siegel* is more than matched by the worth of a traditional marketing practice whose varied benefits were not denied by the Commission. Goodyear's right to continue to employ this method to distribute its products involves considerations at least as important as the right of a person whose family controls one motor carrier to own stock in another (as in *Gilbertville*) and the desire of motor carriers to avoid certification of additional competition (as in *Burlington*).

Moreover, the variety of possible remedies available to the Commission here is significantly greater than that available in the cited cases. In *Siegel*, for example, the Commission's function was to adopt a proper remedy with respect to a specific trade name, and the choice of remedies—once use of the trade name was found to be deceptive—was obviously restricted to a choice between an outright prohibition or a requirement of full disclosure to the public. Here, the various factors to which the Commission has already pointed in finding an improper restraint themselves indicate the broad range of specific remedies which the Commission could have and should have considered. Among such specific remedies are the following, as already set out in our petition for certiorari (pp. 34-5):*

1. An injunction against the exertion of undue pressure upon oil company dealers to purchase Goodyear TBA,**

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* The listing of possible remedies short of total prohibition of all Goodyear sales commission arrangements does not, of course, mean that these possible remedies are appropriate on the facts and law here. Rather, the listing is undertaken to demonstrate that the Commission failed to consider remedies directly pertinent to the Commission's own view of the case.

** Although such an injunction could here be entered only against Atlantic, the Commission should have shown that it considered whether to enjoin Goodyear from entering into any sales commission agreement with a marketing oil company which did not promise in that agreement to meet such standards.

making clear that dealers were free to purchase TBA products from anyone at any time. This might include requirements that:

(a) All oil company dealers be furnished a copy of the Commission's order;

(b) All oil company dealers be reminded periodically that they have freedom of choice;

(c) All oil company dealer complaints received by the oil company or the rubber company be passed on by the recipient to the Commission with an explanation as to the facts and any corrective measures taken.

2. An injunction circumscribing oil company "power" by modifying an element of the oil company-dealer relationship such as:

(a) Lease terms;

(b) Equipment loans;

(c) Credit card coverage;

(d) Cooperative advertising; and

(e) Joint merchandising.

3. An injunction against an oil company's limitation of a particular sales commission agreement to a geographical portion of its total sales commission arrangements.

4. An injunction assuring that an oil company in its sales commission arrangements affords its dealers an alternative choice of sponsored brands of TBA.

5. An injunction against any limitation of the number of Goodyear "supply points", coupled with requirements that:

(a) The "supply point" function be assigned to anyone who meets objective standards and is willing to assume the responsibilities; and

(b) unless completely impracticable in a particular case, an oil company dealer have more than one supply point available to him.

Furthermore, the Commission would not have been breaking new ground in adopting a remedy involving petroleum products and TBA which stopped short of total abolition of sales commission arrangements. In *United States* v. *Richfield Oil Corp.,* 99 F. Supp. 280 (S. D. Cal. 1951), *aff'd per curiam,* 343 U. S. 922, total requirements and tying arrangements were voided, but the decree left intact a sales commission plan for automobile accessories. Moreover, in two other litigated cases and a consent decree, the right of the oil company to "sponsor" TBA products was specifically preserved. *United States* v. *Standard Oil Co. of California,* 78 F. Supp. 850, 891 (S. D. Cal. 1948), *aff'd* 337 U. S. 293; *United States* v. *Sun Oil Co.,* 176 F. Supp. 715 (E. D. Pa. 1959) (decree unreported); *United States* v. *Standard Oil Co. of California,* CCH 1959 Trade Cas. ¶69,399 (S. D. Cal. 1959).*

Rather than following precedent (indeed, rather than even mentioning precedent), the Commission fixed upon destruction of Goodyear's sales commission plans. But given the undisputed benefits of such plans, the finding that Goodyear did not itself engage in any pressuring of Atlantic's dealers, and the complete failure of proof of illegality in Goodyear's arrangements with other oil com-

* It was obviously the judicial judgment that the oil company "power" which concerns the Commission could be properly handled by restraint of its exercise. Moreover, another remedy available if such "power" were to result in undue pressure against a dealer is a treble damage action. See *Osborn* v. *Sinclair Refining Co.,* 286 F. 2d 832 (4th Cir. 1960), *cert. denied,* 366 U. S. 963, discussed in Point I, *supra.*

panies, there is no reasonable basis for broad scale banishment.*

The order here represents a refusal by the Commission to use the very expertise which Congress intended it to exercise. No legislative purpose is fulfilled by unskilled obliteration of an entire marketing institution.

It is submitted that in imposing its remedy the Commission failed to perform its required duties.

CONCLUSION.

This Court should reverse and remand for dismissal of the complaint.

Respectfully submitted,

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January 28, 1965

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* It is clear that the Commission's remedy must bear some reasonable relation to the alleged violation. See *e.g., National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 226; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 217-18; *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F. 2d 833, 837-38 (2d Cir. 1961), *cert. denied*, 368 U. S. 987; *Audivox, Inc.* v. *Federal Trade Commission*, 275 F. 2d 685 (1st Cir. 1960); *Elliot Knitwear, Inc.* v. *Federal Trade Commission*, 266 F. 2d 787, 790-91 (2d Cir. 1959).

ANNEX A.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman
PHILIP ELMAN
EVERETTE MACINTYRE
JOHN R. REILLY
MARY GARDINER JONES

In the Matter *of* PURE OIL COMPANY, a Corporation.	Docket No. 6640
In the Matter *of* THE TEXAS COMPANY, a Corporation.	Docket No. 6898
In the Matter *of* STANDARD OIL COMPANY (INDIANA), a Corporation.	Docket No. 7567
In the Matter *of* SHELL OIL COMPANY, a Corporation.	Docket No. 8537

Annex A-2.

Final Order.

In the exercise of the Commission's administrative discretion, and without rendering decisions adjudicating any issues of law or fact involved,

It is ordered that the initial decisions in the above-captioned proceedings be, and they hereby are, set aside, and that the complaints be, and they hereby are, dismissed, for the following reasons:

(1) In three of these cases, there is no quorum of the Commission at the present time for rendering adjudicative decisions on the merits and issuing any orders to cease and desist based upon findings of violation of law. Adjudication of these cases would require reargument of the appeals. The specific practices challenged in these cases occurred almost a decade ago, in the mid-1950's, and competitive conditions in this dynamic and rapidly changing industry appear to have altered signficantly since then.

(2) The Commission has this date announced the initiation of a broad inquiry into the problems of competition in the marketing of gasoline. Orders to cease and desist entered against a few oil companies—orders which would probably not become final, if at all, until completion of lengthy review proceedings in the Federal Courts of Appeals and the Supreme Court—could not provide complete or effective solution to the competitive problems of the gasoline industry. It would appear to be more desirable, from the standpoint of effective administration of the law, that the Commission concentrate its necessarily limited resources on a comprehensive industry-wide approach to the problems of competition in the marketing of gasoline.

By the Commission, with Commissioner Dixon not participating and with Commissioner MacIntyre dissenting for the reasons stated by him in the accompanying dissenting opinion.

Joseph W. Shea,
Secretary.

Issued: December 28, 1964

Seal

Annex A-3

UNITED STATES OF AMERICA

Before Federal Trade Commission

Commissioners:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

In the Matter *of* Pure Oil Company, a Corporation.	Docket No. 6640
In the Matter *of* The Texas Company, a Corporation.	Docket No. 6898
In the Matter *of* Standard Oil Company (Indiana), a Corporation.	Docket No. 7567
In the Matter *of* Shell Oil Company, a Corporation.	Docket No. 8537

Annex A-4

Commissioner MacIntyre, dissenting:

These cases are of vital importance, not only to the public but to the businessmen engaged in the petroleum industry. Likewise, it is of importance that the vital issues involved in these adjudicative cases be resolved. This the Commission has decided to avoid. In its order the Commission states that the cases are being dismissed "without rendering decisions adjudicating any issues of law or fact involved." This is error. The "aggrieved" are entitled to a resolution of the issues involved here. This is demanded by not only the equities involved but also as a matter of moral right and by at least the spirit of the Administrative Procedure Act.

The Majority excuses its action by stating that these adjudicative matters are being dismissed "In the exercise of the Commission's administrative discretion" and "without rendering decisions adjudicating any issues of law or fact involved." I respectfully submit that the portion of the Administrative Procedure Act commencing with Section 5 under the heading of "Adjudication" contemplates no such treatment. Moreover, the further excuse is advanced through the indication that if remedial measures should be required regarding any practice, it would be attempted following the initiation of a broad inquiry into the problems of competition in the marketing of gasoline. In that connection, it is stated that orders to cease and desist, if entered in these cases, would not provide a complete or effective solution to the competitive problems of the oil industry. Let it be understood my dissent here is not directed against the absence of cease and desist orders in these cases; rather, I am dissenting to action by the Majority which avoids adjudication of the vital issues involved. The Majority has not fulfilled its responsibility for making findings of fact and stating its conclusions thereon regarding the practices involved. Thus, it is advising no one concerning the existence or the significance of any of the practices involved.

I am mindful of a statement in the Commission's "Final Order" to the effect that "there is no quorum of the Commission at the present time for rendering adjudicative deci-

sions on the merits." With that assertion I emphatically disagree. The Commission has mustered a quorum sufficient to act and with which it is acting on these cases. I agree that if the members of the Commission, who are acting to dismiss these cases without an adjudication of the issues, should undertake to adjudicate the issues involved, it would be appropriate for them to hear re-arguments on the appeals.

It is the position of the Majority that it would be inappropriate to hear re-arguments on the appeals. Reference is made to the limited resources available to the Commission. Re-arguments in these cases would not unduly draw upon the limited resources of the Commission. No convincing proof has been advanced which would show the need of any substantial additional allocation of funds or personnel to provide for re-argument of these cases. The work is done and the funds allocated to the cases have been spent. In passing, it should be noted that the Commission's records disclose that the tax payers contributed substantially to those funds. For example, the records show that the government has spent between $125,000 and $200,000 in covering the costs of the litigation in these cases. Undoubtedly the respondents spent much larger sums on the cases in the course of litigation. The result we get is the disposition of the issues without deciding the appeals on the merits.

The opinion of the Majority points to an intent to try the use of industry-wide methods for dealing with the problems and practices said to exist in the petroleum industry and for advising businessmen about their responsibilities concerning such problems and practices. On its face, this expression of intent is admirable. I hope, however, that I may be pardoned, under the circumstances, for finding this formula less than reassuring. The two most obvious avenues to an understanding of gasoline marketing problems are either making findings in the pending adjudicative cases or in the rule making fact finding proceeding requested by important segments of the industry. The proposed "broad inquiry" does not expressly provide for

the Commission to make findings of fact on the data submitted as it is obliged to do in adjudicative cases or in a trade regulation rule proceeding.

Unfortunately, I am unable to discern an interest here to find the facts and act on them in grappling with these challenging problems. Indeed, our present inability to act seems part and parcel of a more extensive malady. A recent line of Commission decisions evince a regrettable trend toward disposing of adjudicatory matters on procedural grounds, thus avoiding difficult legal and policy problems.[1] Undoubtedly this is a convenient formula, at least in the short run, for those of us responsible for administering these statutes. On final analysis, however, it plainly constitutes an abdication of the Commission's functions, which is charged with advising businessmen of their obligations under the law.

As a member of the Commission who participated with other members of the Commission in hearing appeals in these cases, I am convinced from what I have learned in hearing and considering these cases that undoubtedly in some of the cases the Commission on some issues would have found complaints not sustained. Findings on those

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[1] *E.g., S. Klein*, 60 F. T. C. 388, 419 (1962). A case involving a most important commerce question was dismissed without reason for that action. In *General Electric Company*, Docket 8487, F. T. C. (February 28, 1964), a case involving very significant questions under Section 2(d) of the Robinson-Patman Act, as well as issues of price fixing under Section 5 of the Federal Trade Commission Act, was dismissed on February 28, 1964, "without adjudicating any issue of fact or law contested on this appeal." In *The Papercraft Corporation*, Docket 8489, F. T. C. (December 24, 1963), a charge of fictitious pricing was dismissed, although the issue had been fully tried because ". . . in the particular circumstances of this case, the public interest requires that the initial decision be vacated, and the complaint and complaint counsel's appeal dismissed, without determination of the merits of the charge." Further, the Commission refused to initiate a trade regulation rule proceeding, although requested to do so by representatives of the Gift Wrappings Industry, who contended such practices were rife in the industry. The Commission, in *Papercraft*, therefore, while abandoning the "case by case" basis, at the same time failed to act on an industry-wide basis in response to an industry-wide problem.

issues in those cases undoubtedly would have been differentiated from findings on other issues in other cases. I repeat, here we avoid dealing with those troublesome problems in cases where records on facts have been made. Indeed, we are here confessing bankruptcy in our efforts to find the facts and make judgments on these problems. Certainly, this is true to this date, insofar as the marketing problems of the oil industry are concerned. Although I am unable to accept as justifiable this bankruptcy at this point in time, I do find some consolation in the promise of the Commission that after a "broad inquiry" in the future the Commission will undertake to make some determination whether competitive problems really exist in the petroleum industry in the marketing of gasoline.

December 28, 1964

Statement of the Federal Trade Commission Announcing Broad Inquiry into the Problems of Competition in the Marketing of Gasoline.

The marketing of automotive gasoline to the public is a matter of direct and immediate concern to every American who owns a car, to the more than one hundred thousand independent retail gasoline dealers, to the producers, refiners, jobbers, and wholesale distributors of gasoline and other petroleum products, and to the nation's economy generally. The Federal Trade Commission has a broad range of responsibilities with respect to the preservation of fair and free competition in such marketing. The Commission is responsible for the prevention of deceptive and misleading advertising of gasoline to the consuming public. It is responsible for preventing discriminatory and other monopolistic and anticompetitive methods and practices in the distribution of gasoline. Most comprehensively, the Commission, in the role of watchdog of the free competitive system, has a responsibility to scrutinize the competitive functioning of the gasoline industry and, if necessary, to

take appropriate administrative action within its powers, and recommend legislative or other remedies to such competitive problems as may not be susceptible of effective solution under existing laws and procedures.

The Commission has received a large number of inquiries, complaints, and petitions from various groups in the gasoline industry, from members of Congress, and from members of the consuming public, with respect to competitive problems in the marketing of gasoline. It is evident both from these submissions and from the Commission's experience in this industry in enforcing the laws which it administers that a broad, comprehensive, and industry-wide approach to the competitive problems of the industry is necessary, and that specific remedial measures required in the public interest should not be attempted before obtaining a solid factual foundation in regard to the competitive conditions of gasoline distribution. As the Supreme Court stated in a recent decision, proper and effective remedial action in this industry requires that the Commission make realistic appraisals of relevant competitive facts, and these facts are highly complex. The Commission has accordingly determined forthwith to institute an industry-wide inquiry into the competitive problems of marketing gasoline. The Commission intends to employ its flexible administrative powers of investigation and fact-finding as may be found necessary to assure a complete, fair, and realistic understanding of the structure and dynamics of competition in the industry.

As the initial step in this inquiry, the Commission will conduct public hearings, to be held before the members of the Commission in Room 532 of the Federal Trade Commission Building, Pennsylvania Avenue and Sixth Street, commencing at 10:00 A. M. on May 3, 1965. All interested persons, including but not limited to members of the public and of the gasoline industry, are invited to participate in these hearings. Participants are invited to submit data, views, and argument on the following topics: (1) the market structure and competitive behavior of the various segments and levels of the gasoline industry; (2) the pricing of gaso-

line at all levels of distribution; (3) the causes and effects of so-called "price wars"; (4) competition between branded and unbranded gasoline and between integrated and non-integrated refiners; (5) gasoline grades and qualities, with specific reference to the bearing of gasoline exchange agreements, additives, and octane ratings; (6) other matters pertinent to competition in the marketing of automotive gasoline.

All interested persons are invited to file written data, views, or argument concerning the subject-matter of these hearings with the Secretary of the Federal Trade Commission, Pennsylvania Avenue and Sixth Street, N. W., Washington, D. C. 20580, not later than April 5, 1965. If practicable, twenty (20) copies of all written submissions should be filed. Any person desiring to present his views orally at the hearings commencing May 3, 1965, should so inform the Secretary of the Commission by April 26, 1965, and also inform the Secretary of the estimated time required for oral presentation. The Commission may impose reasonable limitations upon the time allotted to any person or organization. The data, views, and argument presented orally or in writing will be available for examination by interested persons at the Federal Trade Commission, Washington, D. C.